IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Writ Petition (M/S) No. 1246 of 2003

1. Smt. Prema Devi, W/O Late Bhairab Dutt Pandey.
2. Km. Alka Pandey, D/O Late Bhairab Dutt Pandey.
3. Km. Anita Pandey, D/O Late Bhairab Dutt Pandey.
4. Sanjay Pandey S/O Bhairab Dutt Pandey,
5. Ajay Pande, S/O Bhairab Dutt Pandey.
6. Govind Ballabh Pandey (deceased) substituted by is legal heirs 6/1 Smt. Janki Devi W/O Sri Govind Ballabh Pandey, 6/2 Ruchi Pandey D/O Late Sri Govind Ballabh Pandey, 6/3 Suchi Pandey D/O Late Govind Ballabh Pandey,
7. Chandra Shekhar Pandey, S/O Late Moti Ram Pandey,
8. Dinesh Chandra Pandey, S/O Late Moti Ram Pandey,
9. Smt. Basanti Pandey, W/O Late Jagdish Chandra Pandey,
10. Km. Renu Pandey, D/O Late Jagdish Chandra Pandey,
11. Jeewan Chandra Pandey S/O Late Jagdish Chandra Pandey, All residents of Vilalge Jhutia, Patti Ramgarh, Tehsil and District Nainital.

… Petitioners.

Versus

1. Additional Chief Revenue Commissioner, Circuit Court, Uttaranchal, Nainital.
2. Gram Sabha Jhutia, Patti Ramgarh, Tehsil & District Nainital through its Pradhan.
3. State of Uttaranchal through Collector, Nainital.
4. Mathura Dutt Pandey, S/O Late Bishan Dutt Pandey,
5. Ishwari Dutt Pandey, S/O Late Bishan Dutt Pandey, Both residents of Village Jhutia, Patti Ramgarh, Tehsil & District Nainital.

…Respondents

Sri Rajendra Dobhal, learned counsel for the petitioners.
Sri H.M.Raturi, learned Standing Counsel for the State-respondents no. 1 &3.
Sri M.C.Kandpal, Sr.Advocate assisted by Sri S.S.Chaudhary, learned counsel for the respondent no.4&5.

Dated July 18, 2007.

Hon'ble B.S.Verma,J.

This writ petition is directed for quashing the impugned judgment and order dated 3-11-2003 (Annexure No. 10) passed by the Additional Chief Revenue Commissioner, Uttaranchal, Nainital, whereby the partition suit was remanded to the trial court, i.e. Assistant Collector Nainital for deciding the

Same afresh in the light of observation made in the judgment. The suit is for partition of the land in dispute. The suit was dismissed by the trial court and the appeal too was dismissed by the first appellate court, i.e. Commissioner Kumaun Division.

According to the petitioners, Moti Ram Pandey and Bishan Dutt Pandey were two sons of late Radhapati and both of them have got 137 Nali, 8 Muthi land situated in village Jhutiya, Ramgarh, District Nainital on the basis of order dated 11-9-1920 passed in Revenue suit no. 5/5 of 1920. The petitioners have further contended that after getting the possession of their share, i.e. half share of 137 Nali, 8 Muthi land, it was agreed between Moti Ram Pandey and Biushan Dutt Pandey to the effect that each of them will take over the possession of the land of their share and in pursuance of oral agreement, Moti Ram Pandey got possession of his half share and made the land cultivable and started cultivation over the same. The rest of land belonging to Bishan Dutt Pandey remained barren. Bishan Dutt Pandey left the village and went to Burma and remained out of village up to the month of March 1953. In the Month of April 1953, he returned to village and tired to interfere in possession of Moti Ram Pandey, Consequently, a criminal case No. 13/23 of 1953, Bishan Dutt Pandey Vs. Moti Ram Pandey under Section 145 Cr. P.C. was initiated between the two brothers, Bishan Dutt and Moti Ram Pandey, in which the Sub Divisional Magistrate Nainital passed an order on 12-8-1953 holding that Moti Ram Pandey is in possession over the land and he will not be evicted from he land except in accordance with law. Hence, Bishan Datt Pandey filed a suit for partition of bhumidhari land situated in village Jhutia, Patti Ramgarh against his brother Moti Ram Pandey on 16-11-1954, which was registered as Suit No. 27/24 of 1954-55 Bishal Dutt Pandey Vs. Moti Ram Pandey. The proceedings of the suit were stayed upto the year 1956 on account of settlement operations. During the pendency of the suit, plaintiff Bishan Dutt died on 27.6.1968 and after his death, since no substitution application was filed on behalf of legal heirs of the

deceased, the suit was abated. It was further contended that subsequently an application on 12.11.1968 under Order 22, Rule 9 C.P.C. was filed to substitute legal heirs of late Bishan Dutt Pandey, but that was rejected by the Assistant Collector vide order dated 22-9-1972 (Annexure No. 4 to the writ petition). The suit was dismissed on 22-9-1972 on the ground that the suit had already abated before 12.11.1968.

Sri Mathura Datt Pandey and Ishwari Datt Pandey, sons of late Bishan Dutt Pandey filed separate suit for partition, which was dismissed. Appeal was also dismissed. Second Appeal was filed by the respondent nos. 4 and 5. By the impugned judgment and order, the suit has been remanded to the trial court.

The impugned judgment has been assailed on the ground that the Second Appellate Court has no jurisdiction to interfere in the findings of fact arrived at by the trial court and confirmed by the 1st Appellate Court. Moreover, the second suit was filed on behalf of Mathura Dutt Pandey and Ishwari Dutt Pandey, which is barred by the provisions of Order 22, Rule 9 C.P.C. Thirdly, Mathura Dutt Pandey and Ishwari Dutt Pandey, respondent nos. 4 and 5 have already been ousted from the land in the year 1953 and the land was in sole possession of Moti Ram Pandey and thereafter, his legal heirs since 1920, therefore, the suit on behalf of Mathura Dutt Pandey and Ishwari Dutt Pandey has become time barried and fourthly, the rights of Mathura Dutt Pandey and Ishwari Dutt Pandey have already been extinguished from the land in view of Section 189(c) of the U.P.Zamindari Abolition and Land Reforms Act.

It is not disputed that bout Moti Ram Pandey and Bishan Dutt Pandey had already died and legal heirs of both the deceased are tenure holders and are contesting the suit.

The respondent nos. 4 and 5 in their counter affidavit has stated that the respondents are co sharers of the land in dispute and in the revenue records, they are recorded tenure holders along with the plaintiff and are in possession jointly and co-sharers have a right to sue for partition and get their shares separated under Section 176 of the U.P.Z.A. and L.R.Act. The only remedy available under the Act is of partition suit and the remedy under Section 209 of the U.P.Z.A. and L.R. Act is not attracted in case of a co-tenure holder and he has never been ousted from the disputed land.

The learned Additional Chief Revenue Commissioner Uttaranchal Nainital remanded the case with the observation that the trial court shall find out first the position of 137 Nali land, which was acquired by the predecessors of the petitioners and respondent nos. 4 and 5 in the year 1920 in Partition Suit and shall then proceed further for partition of the land. According to the respondent nos. 4 and 5, out of total land, land worth 95 Nali, 15 Muthi has gone to the share of first wife of deceased Radhapati, the predecessor of the petitioners and respondent nos. 4 and 5. The finding is totally perverse to this effect that the trial court is to find out the position of 137 Nali land because both the petitioners and respondents are not claiming the land more than 46 Nali, 5 Muthi. The only dispute is whether the petitioners and respondents no. 4 and 5 are co-tenure holders and re in possession or the petitioners have perfected their right by adverse possession as alleged by the petitioners that the respondents were not in possession and they left the village in the year 1953 and they had been ousted from the land in question. Before the learned Additional Chief Revenue Commissioner both petitioners as well as respondents did not claim 137 Nali of land. The partition suit is with regard to 46 Nali, 5 Muthi land, which has been claimed by both the parties. The Court cannot direct to decide a third case. So far as there is direction to the trial court to find out first 137 Nali land and then to proceed further, the4 same is not tenable. The trial court has already framed

as many as five issues in the suit, which need not be reiterated and the finding shall be recorded by the trial court afresh on these issues after affording opportunity of leading fresh evidence and after hearing both the parties.

For the discussion above, the writ petition is liable to be partly allowed.

The writ petition is partly allowed. The impugned order under challenge is set aside. The trial court is directed to decide the partition suit afresh after giving opportunity of adducing fresh evidence and after hearing both the parties on merits in accordance with law and in the light of the observations made above, expeditiously as far as possible without any unnecessary delay.

All applications stand disposed of.

(B.S.Verma, J.)

RCP